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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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12 COLLEEN DOMINGUEZ, ) CV 15-09683-RSWL-AJWx  
13 )  
14 Plaintiff, ) **ORDER** re: Defendant's  
15 v. ) Motion to Dismiss  
16 ) Plaintiff's Complaint  
17 FS1 LOS ANGELES, LLC, ) [15]  
18 Defendant. )  
19 )

20 Plaintiff Colleen Dominguez's action is for  
21 employment discrimination on the basis of gender and  
22 age, and unlawful retaliation, in violation of the Age  
23 Discrimination in Employment Act, 29 U.S.C. § 621 *et*  
24 *seq.* ("ADEA") and Title VII of the Civil Rights Act of  
25 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title  
26 VII").

27 Currently before the Court is Defendant FS1 Los  
28 Angeles, LLC's ("Defendant") Motion to Dismiss

Plaintiff's Complaint [15] ("Motion to Dismiss") pursuant to Federal Rule of Civil Procedure 12(b)(6).

Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS** Defendant's Motion to Dismiss, and **DISMISSES** Plaintiff's Complaint **WITH TWENTY (20) DAYS LEAVE TO AMEND** the deficiencies in the fourth cause of action for unlawful retaliation.<sup>1</sup>

## I. DISCUSSION

### A. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of one or more claims if the pleading fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Dismissal can be based on a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

In ruling on a 12(b)(6) motion, a court must presume all factual allegations of the complaint to be

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<sup>1</sup> The Court **DENIES** Defendant's Request for Judicial Notice [16] and **DENIES** Plaintiff's Request for Judicial Notice [21], as judicial notice of the facts contained in these requests is not necessary to the Court's determination of the Motion to Dismiss. See Rouse v. Conner, No. C 12-2121 PJH, 2012 WL 2589240, at \*1 (N.D. Cal. July 3, 2012).

1 true and draw all reasonable inferences in favor of the  
 2 non-moving party. Klarfeld v. United States, 944 F.2d  
 3 583, 585 (9th Cir. 1991). The question presented by a  
 4 motion to dismiss is not whether the plaintiff will  
 5 ultimately prevail, but whether the plaintiff has  
 6 alleged sufficient factual grounds to support a  
 7 plausible claim to relief, thereby entitling the  
 8 plaintiff to offer evidence in support of its claim.  
 9 Iqbal, 556 U.S. at 678; Swierkiewicz v. Sorema N.A.,  
 10 534 U.S. 506, 511 (2002). While a complaint need not  
 11 contain detailed factual allegations, a plaintiff must  
 12 provide more than "labels and conclusions" or "a  
 13 formulaic recitation of a cause of action's elements."  
 14 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)  
 15 (internal citation omitted). However, a complaint  
 16 "should not be dismissed under Rule 12(b)(6) 'unless it  
 17 appears beyond doubt that the plaintiff can prove no  
 18 set of facts in support of his claim which would  
 19 entitle him to relief.'" Balistreri, 901 F.2d at 699  
 20 (9th Cir. 1990) (citing Conley v. Gibson, 355 U.S. 41,  
 21 45-46 (1957)).

## 22 **B. Discussion**

### 23 1. First and Fifth Amendment Affirmative Defenses

24 Defendant argues that its editorial decisions,  
 25 including which of Plaintiff's story ideas to pursue  
 26 and produce, which interviews to conduct, how much time  
 27 to devote to Plaintiff's ideas, and which reporter  
 28 should cover and present each story, arise under

1 Defendant's First Amendment constitutional rights, and  
2 insulate Defendant from application of Title VII or the  
3 ADEA. Defendant also argues that Title VII and the  
4 ADEA, as applied to Defendant's assignment and casting  
5 decisions, are void for vagueness in violation of  
6 Defendant's Fifth Amendment Due Process rights.

7 Generally, a court will not dismiss a complaint for  
8 failure to state a claim under Rule 12(b)(6) when a  
9 defendant merely pleads affirmative defenses. This is  
10 because a plaintiff does not need to anticipate and  
11 plead around all potential defenses. See Gomez v.  
12 Toledo, 446 U.S. 635, 640 (1980); Xechem, Inc. v.  
13 Bristol-Myers Squibb Co., 372 F.3d 899, 901 (7th Cir.  
14 2004). "Only when the plaintiff pleads itself out of  
15 court - that is, admits all the ingredients of an  
16 impenetrable defense - may a complaint that otherwise  
17 states a claim be dismissed under Rule 12(b)(6)."  
18 Xechem, 372 F.3d at 901; ASARCO, LLC v. Union Pac. R.  
19 Co., 765 F.3d 999, 1004 (9th Cir. 2014) ("Dismissal  
20 under Rule 12(b)(6) on the basis of an affirmative  
21 defense is proper only if the defendant shows some  
22 obvious bar to securing relief on the face of the  
23 complaint."); Sams v. Yahoo! Inc., 713 F.3d 1175, 1179  
24 (9th Cir. 2013) ("[T]he assertion of an affirmative  
25 defense may be considered properly on a motion to  
26 dismiss where the 'allegations in the complaint suffice  
27 to establish' the defense." (quoting Jones v. Bock, 549  
28 U.S. 199, 215 (2007))). Similarly, a motion to dismiss

1 under Rule 12(b)(6) cannot be granted based upon an  
2 affirmative defense unless that "defense raises no  
3 disputed issues of fact." Scott v. Kuhlmann, 746 F.2d  
4 1377, 1378 (9th Cir. 1984); ASARCO, 765 F.3d at 1004.

5 Here, the allegations in Plaintiff's Complaint do  
6 not disclose affirmative defenses under the First and  
7 Fifth Amendments to the Constitution, and Plaintiff  
8 does not "plead herself out of court." Xechem, 372  
9 F.3d at 901. Plaintiff's Complaint asserts that she  
10 was denied employment opportunities on the basis of her  
11 age and gender. Plaintiff's request that she is not  
12 precluded from employment opportunities because of her  
13 age and gender do not, on their face, trigger First  
14 Amendment or Due Process concerns.

15 This Court finds it improper to provide Defendant a  
16 blanket exemption from the requirements of Title VII  
17 and the ADEA where Plaintiff does not allege that she  
18 seeks to espouse a particular message using her  
19 employment with Defendant as a vehicle, seeks to alter  
20 Defendant's chosen message, or seeks to otherwise  
21 dictate the content of Defendant's programming. See  
22 Hausch v. Donrey of Nev., Inc., 833 F. Supp. 822, 830  
23 (D. Nev. 1993) (finding that application of Title VII  
24 did not require a newspaper to publish any material  
25 that it did not wish to publish, and thus, did not  
26 regulate content in violation of the First Amendment);  
27 see also Hurley v. Irish-American Gay, Lesbian and  
28 Bisexual Grp. of Boston, 515 U.S. 557, 566 (1995)

1 (finding First Amendment violation where plaintiffs'  
2 participation in defendants' parade expressed a message  
3 not of the defendants' own choosing); Passaic Daily  
4 News v. N.L.R.B., 736 F.2d 1543, 1555-1559 (D.C. Cir.  
5 1984) (distinguishing between government regulation of  
6 the press's labor practices and government regulation  
7 of the press's editorial control, and noting that  
8 although the newspaper could not be forced to print the  
9 columnist's weekly column, the First Amendment did not  
10 completely insulate the newspaper from application of  
11 federal labor law); Claybrooks v. Am. Broad. Cos., 898  
12 F. Supp. 2d 986, 993 (M.D. Tenn. 2012) (finding First  
13 Amendment violation where plaintiffs sought to alter  
14 defendant's message through application of an anti-  
15 discrimination statute).

16 At this stage in the proceedings, Defendant cannot  
17 demonstrate that there is a relationship between its  
18 ability to choose its reporter on the basis of sex,  
19 gender, or any other characteristics prohibited by  
20 Title VII, and its ability to control the content and  
21 character of its shows.

22 Accordingly, dismissal pursuant to Rule 12(b)(6) is  
23 improper, and the Court **DENIES** Defendant's Motion to  
24 Dismiss on the basis of the First and Fifth Amendment  
25 affirmative defenses. See ASARCO, 765 F.3d at 1004.

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1           2.   Sufficiency of Plaintiff's Complaint

2           In addition to its constitutional arguments,  
3 Defendant argues that Plaintiff's third and fourth  
4 claims are inadequately pled, and should be dismissed  
5 pursuant to Rule 12(b)(6).

6           a.   *Third Claim for Discrimination on the*  
7               *Basis of Age and Gender in Violation of*  
8               *Title VII and the ADEA*

9           Defendant argues that Plaintiff's third claim  
10 should be dismissed because Plaintiff cannot, as a  
11 matter of law, assert an "age-plus" claim under the  
12 ADEA. Mot. 19:5.

13          Although courts have rejected "age-plus" theories  
14 under the ADEA, the Ninth Circuit has recognized a  
15 "sex-plus" theory of discrimination under Title VII.  
16 See Kelly v. Drexel Univ., 907 F. Supp. 864, 875 n. 8  
17 (E.D. Pa. 1995) (rejecting an "age-plus" theory of  
18 liability under the ADEA); Lam v. Univ. of Haw., 40  
19 F.3d 1551, 1562 (9th Cir. 1994) (recognizing a "sex-  
20 plus" theory of discrimination under Title VII).

21          Plaintiff's third claim is adequately pled as a  
22 "sex-plus-age" claim under Title VII, even if the claim  
23 is not cognizable under the ADEA.

24          b.   *Fourth Claim for Unlawful Retaliation*

25          To allege a claim for retaliation, Plaintiff must  
26 allege: (1) that she was engaging in a protected  
27 activity, (2) that she suffered an adverse employment  
28 decision, and (3) that there was a causal link between

1 her activity and the employment decision. Trent v.  
2 Valley Elec. Ass'n Inc., 41 F.3d 524, 526 (9th Cir.  
3 1994). To demonstrate an adverse employment action,  
4 Plaintiff must show that the alleged retaliatory acts  
5 "materially affect[ed] the compensation, terms,  
6 conditions, or privileges of . . . employment." Blount  
7 v. Morgan Stanley Smith Barney LLC, 982 F. Supp. 2d  
8 1077, 1082 (N.D. Cal. 2013).

9 Defendant argues that Plaintiff fails to show  
10 causation because she does not identify any adverse  
11 employment actions that post-date her complaint on  
12 August 3, 2015. Mot. 20:18-21. Defendant also argues  
13 that Plaintiff fails to allege any facts to support  
14 that the alleged retaliatory acts altered the terms of  
15 her employment in any way. Reply 20:11-17.

16 Plaintiff, on the other hand, alleges that after  
17 she complained on August 3, 2015, "Defendant  
18 subsequently communicated to Dominguez's co-workers  
19 that Dominguez was no longer employed at Defendant and  
20 that Dominguez had sued Defendant," and that "Defendant  
21 represented that it would investigate her complaint,  
22 [but] Dominguez has never been informed of the outcome  
23 of any investigation." Compl. ¶ 23. These allegations  
24 are sufficient to allege a causal link between  
25 Plaintiff's complaint and the above-mentioned alleged  
26 retaliatory acts.

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1        However, Plaintiff's allegations that Defendant  
2 passed over her for assignments occurred before  
3 Plaintiff complained, and Plaintiff does not adequately  
4 allege a causal connection in this regard.

5        In addition, Plaintiff's allegations that Defendant  
6 made the above-mentioned representations to her co-  
7 workers and failed to investigate are not sufficient to  
8 demonstrate that these actions altered the terms or  
9 conditions of Plaintiff's employment. See Morrow v.  
10 City of Oakland, 2012 WL 2133755, at \*11 (N.D. Cal.  
11 June 12, 2012) (granting motion to dismiss retaliation  
12 claims where claims were based on failure to  
13 investigate and other actions that did not constitute  
14 adverse employment actions).

15        For these reasons, Plaintiff does not adequately  
16 allege a claim for unlawful retaliation. The Court  
17 **GRANTS** Defendant's Motion to Dismiss Plaintiff's fourth  
18 claim. Because Plaintiff's claim could be saved by  
19 amendment, the Court **DISMISSES** the claim **WITH TWENTY**  
20 **(20) DAYS LEAVE TO AMEND.**

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1                                   **III. CONCLUSION**

2           Because Plaintiff is not required to anticipate and  
3 plead around Defendant's affirmative defenses,  
4 dismissal on the basis of Defendant's First and Fifth  
5 Amendment affirmative defenses is improper. However,  
6 Plaintiff's fourth claim for unlawful retaliation is  
7 insufficiently pled. Accordingly, the Court **GRANTS**  
8 Defendant's Motion to Dismiss, and dismisses  
9 Plaintiff's Complaint **WITH TWENTY (20) DAYS LEAVE TO**  
10 **AMEND.**

11           **IT IS SO ORDERED.**

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13 DATED: May 17, 2016

s/ RONALD S.W. LEW

14                                   **HONORABLE RONALD S.W. LEW**  
15                                   Senior U.S. District Judge  
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